Efficiency Gains

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Abstract

The EC merger regulations and the Guidelines from 2004 both claim that efficiencies shall be acknowledged in the assessment of mergers in the European Union. So far there has been little proof of this, and this thesis attempts to see how they can play a more important role in the future of EC mergers. In doing so, the thesis first defines the three categories of mergers, and how they can impede competition. Second, it goes through the different types of efficiencies

that may arise. Third, and finally, it looks on how the assessment of efficiency gains in mergers can be done differently

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1 Introduction

1.1 Background

According to the new EC merger Regulation (hereafter “the Merger Regulation”)[1], merger driven efficiencies can be considered a positive element in the overall assessment of mergers. Efficiencies may “counteract the . . . potential harm to consumers” from a merger and “as a consequence” it is possible that the merger “would not significantly impede effective competition”.[2] Further, article 2 of the Merger Regulation provides that the Commission “shall take into account . . . the development of technical and economic progress provided that it is to consumers' advantage”. *The Guidelines on assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*[3] (hereafter the Guidelines) similarly indicate that “efficiencies brought about by a merger [may] counteract the effects on competition and in particular the potential harm to consumers it might otherwise have” and efficiencies therefore are considered in determining "whether a merger would significantly impede effective competition".[4] In particular, the European Commission focuses on whether merger specific efficiencies would “enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers".[5] There are three conditions for this, and that is that the efficiency gain must be verifiable, merger-specific

[1] Regulation N0 139/2004
[2] Regulation No 139/2004, recital 29
[3] [2004] O.J. C 31/5
[4] Guidelines point76
[5] Guidelines point 77

and benefit consumers.[6]
This was a little revolution. As late as 1996 the commission's position was that "There is no real legal possibility of justifying an efficiency defense under the Merger Regulation".[7] This was popularly referred to as the "efficiency offence". In several cases the commission saw potential efficiencies as an aggravating factor because they could reinforce the post-merger entity's dominance.[8]
But so far no merger has been cleared on the basis on efficiency gains. So how far does efficiency gains really go in the new Merger Regulation?

1.2 Purpose

The main purpose of this master thesis is to evaluate the concept of efficiency gains in mergers under the Merger Regulation and the Guidelines. Now that the Merger Regulation has been in force for three years it's interesting to see how the concept has developed, and also how it can develop in the future into an important tool in the assessment of mergers.

[6] Guidelines point 78
[7] Commission paper at the OECD Roundtable "Competition Policy and Efficiency Claims in Horizontal Agreements", OECD/GC (96) 65, p. 53
[8] See, e.g. case IV/M.856, British Telecom/MCI (II) pt. 58, and case IV/M.50 AT&T/NCR, pts 23 and 28-30

1.3 Method

In this master thesis, I am approaching the concept of efficiency gains in mergers using traditional legal dogma tics as my method. No additional benefits will be gained from historical interpretation of the intent of the legislator, as characteristic as it is to the European Union law and drafting of legislative texts within the EU.
I shall primarily approach efficiency gains from the concept itself, but to do this its necessary to apply some economical theories. Since I’m a law student and not an economic student, I hope that I have been accurate and that anyone with an economic background who read this will have a little mercy if I simplify too much in this regard.
As it is hard to predict the future and indeed, there is some legal uncertainty when it comes to efficiency gains in mergers, this master thesis will have as its rationale to take part on the debates around the concept and try to offer some views of possible future assessments of efficiency claims.

1.4 Delimitations

The case law is chosen purely to serve the main purpose of this master thesis. It will be used in order to demonstrate the development of mergers in recent years, and especially efficiency gains.
This thesis approaches the concept of efficiency gains from the legal perspective. It does not

therefore concentrate on economic theories despite their otherwise high importance in appraisal of efficiency gains.
Efficiency gains are also a part of the substantive assessment of mergers. Jurisdictional and procedural questions therefore fall outside the scope of this thesis. Other issues of the substantive assessment like the concept of concentration, the concept of Community Dimension, identification of undertakings and calculation of turnover are important in the understanding of mergers, but will not be discussed in this thesis.

1.5 Disposition

It didn't take long before I understood that this was a thesis that was difficult in many ways. Everyone I spoke with thought it was a very interesting subject, but warned that it was a task that would be hard. I also went to the Norwegian Bar Association's competition congress, where this topic was one of the topics many lawyers had problems with and wanted to learn more about. Whit this in mind, I've tried to keep it fairly simple, because otherwise the subject would have been too difficult.

Since there is little casework on the subject, a lot of the material has to be found in theory. This is of course regrettable, but at least there is a lot of material to be found.

First in chapter two I will take a look at

horizontal, vertical and conglomerate mergers ans see how these can impede competition.
In chapter three I will see on the three cumulative conditions the Guidelines sets out for efficiencies to be considered positive in the overall assessment of the merger.
In chapter four I will go through the different types of efficiencies mergers may generate,
And in chapter five I will analyze a case from Norway, and then finally see if there is other alternatives to how efficiencies may be assessed in future merger cases in chapter six.

2 Merger control

2.1 general

The purpose of merger control is to prevent companies gaining a market power witch significantly impede effective competition.[9] This differs from cases of abuse under art. 82 of the EC treaty because merger control is forward-looking, while art 82 cases are backward looking. This mean that merger control is a forecast of how the competition in the market will be in the future.[10]
The categories of mergers are horizontal, vertical and conglomerate. Here's a short explanation on how the different types of merger may impede competition. But first a short definition of the main term *merger*

[9] Regulation art. 2 (3)
[10] Faull &Nikpay (2007) p 468

itself.

2.2 definition of merger

The term *merger* shall be used as a synonym for the term concentration used in the Merger Regulation. It therefore covers various types of transactions such as mergers, acquisitions, takeovers and certain types of joint ventures. This is in line with how the term is being used in the regulation. This is a very broad definition, and the reason for this is that it's not the name that is important, but the consequences if has on the market.

2.3 Horizontal mergers

Horizontal merger is a merger between two or more companies who prior to the merger was competitors in the same market.
In horizontal mergers the main issues are non-coordinated effects and coordinated effects.

2.31 Non-coordinated effects

Non-coordinated effects is when the merger "remove important constraint on one or more sellers, who consequently have increased market power", and "the reduction in these competitive constraints could lead to significant price increases in the relevant market".[11]

Most cases here are single dominance cases, where one company gains a market share where it has the possibility, and incentive, to increase their prices. The same may be the case in oligopolistic markets. This is a complicated assessment, which falls outside the scope of this paper. But as an indication the Volvo/Scania case[12] can be mentioned where a market share of 30-40% was enough to prove oligopolistic dominance that could lead to non-coordinated effects.[13]

2.32 Coordinated effects

Coordinated effects is when the merger increases "…the likelihood that firms are able to coordinate their behavior in this way and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of Art. 81 of the Treaty."[14] The coordination here can be in prices, quantities or quality. This happens when there are few players in the market, so the market gets transparent. Then the companies can see it as mutual interest to align their conduct in a way that lessen the consumer welfare.[15]

[11] Guidelines point 24
[12] Case M.1672 Volvo/Scania
[13] Faull & Nikpay (2007) pp 482-483
[14] Guidelines point 39
[15] Faull & Nikpay [2007] p 484

2.4 Vertical mergers

Vertical merger is a merger between companies at different stages in the distribution or production process. The main issue here is foreclosure, which is when the result of a merger increases the barriers to enter the market, or make the access to key inputs more expensive.[16]

But in general vertical mergers are benign, and often maximize consumer welfare by lowering transaction costs, eliminate double marginalization, assure supply of key inputs, or by technological progress.[17]

2.5 conglomerate mergers

Conglomerate merger is a merger between parties in neighboring markets. They are not actual or potential competitors (horizontal mergers), or at different levels of the supply chain (vertical mergers). The main issue here is if the merged group could be able to leverage its dominant position in one market over in the neighboring market. Bundling two or more products is an example of this.
The Court of First Instance confirmed that the Commission has to power to prohibit conglomerate mergers in Tetra Laval BV v Commission[18], but emphasized that conglomerate mergers generally are

[16] Faull & Nikpay [2007] p 495
[17] Lindsay [2006] pp 375-376
[18] Case T-5/02 Tetra Leval BV v Commission points 148-155

neutral or even beneficial for competition. Therefore the burden of proof that the merger is anti-competitive lays on the Commission. This case was appealed to the European Court of Justice[19], and the ECJ upheld the decision. This was again an issue in the GE/Honneywell v. Commission[20], and here the Court of First Instance confirmed the position taken by the ECJ in the Tetra Leval case. And as a result of this, the Commission will probably be reluctant to challenge this in the future.

3 Efficiency gains in mergers

The Commission has three cumulative conditions for efficiencies to be considered positive in the overall assessment of the merger. The efficiencies have to benefit consumers, be merger specific and be verifiable.[21] These conditions are cumulative, and the merging parties have the burden of proof. This is because they are the closest to gather this information, and it's in their interest to convince the Commission that the efficiencies are likely to materialize. If not, the Commission will set the efficiencies aside.

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[19] Case C-12/03P Commission v Tetra Leval BV
[20] Case T-210/01 GE v Commission
[21] Guidelines points 79-88

3.1 Benefit consumers

"The relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger." [22]

First, it's important to clarify what the commission sees as "consumer". Because it's not in the strict way as it is in other laws protecting individual consumers against the stronger and professional seller. According to the Guidelines the commission see all direct or indirect users of the products covered by the agreement as "consumers". This definition is very broad, and other undertakings also fall in under it. This is because the commission's goal is to protect healthy competition in the market in general, and not the individual consumer. And some markets only have professional players, like the airplane engine-market. Still if the seller is to big he will have the opportunity, and incentive, to raise his prices. Therefore it's necessary to have a broad consumer definition.

The next step then is to see how the merger can "benefit" consumers. Here the Guidelines use lower prices or new or improved products or services as examples.[23] Here it would be interesting if there was a case were the prices were likely to rise a little, but it was sure that the merged group at the same time would produce new or better products. This way

[22] Guidelines point 79.

[23] Guidelines points 78

the commission would have to explain in greater detail how they weigh benefits.
But the commission does not leave us totally in the dark. From this it’s possible to see that they have a consumer welfare standard. This is in opposition to a total welfare standard. Both standards can be positive for consumers. The difference is that the total welfare standard seeks to protect by way of maximizing welfare for society, whereas the consumer welfare standard only look at the direct effect for consumers. Economists argue that the total welfare standard is the most accurate and that this would be most beneficial. But this is a policy that would be hard to convince the general public to endorse, so the commission is not likely to shift.[24]

3.12 timely

It’s also very important that the efficiencies materialize as soon as possible after the merger. “The later the efficiencies are expected to materialize in the future, the less weight the Commission can assign them”.[25] This is connected to the third condition that the efficiencies have to be verifiable. Efficiency gains are already a prognosis of the future, and the longer into the future it is, the credibility sinks.
This can of course affect the parties’ success of claiming efficiencies, but at least there is no absolute time frame in which efficiencies have to

[24] Kocmut (2006) p. 20
[25] Guidelines point 82

materialize.[26]

3.13 pass-on requirement

"The greater the possible negative effects on competition, the more the commission has to be sure that the claimed efficiencies are substantial, likely to be realized, and to pass on to a sufficient degree to the consumer."[27]

The rational behind this is that when competition decline, the incentive the post merger party have to pass on the efficiency gains to consumers also decline. This also means that a merger never can end up as the market becoming a monopoly, or approaching a monopoly. How big percentage the merged party can have in the market relies on the other players in the market, and how accessible the market is for now entries.
The pass-on requirement is a result of the EU using consumer welfare as their standard, and many economists criticize it for having absolutely no basis in economic theory. This is because predictions here can only be vague, and that in some situations there is no need for efficiencies to pass on to consumers for the consumers to benefit from it.

3.2 Merger specific

[26] Kocmut (2006) p 23
[27] Guidelines point 84

"Efficiencies are relevant to the competitive assessment when they are a direct consequence of the notified merger ant cannot be achieved to a similar extent by less anticompetitive alternatives."[28]
If not, it would be theoretically possible for a merger to generate efficiencies in another market that would be greater than the loss in the market of the merger. But these efficiencies will be disregarded, and they can probably be reached by a less anti-competitive alternative also. The merger specific requirement is a reflection of the acceptance of an anti competitive presumption, and was clarified in the , Aerospatiale-Alenia/de Havilland case.[29] Since mergers increase concentration, and concentration is assumed to result in price increase, the merger specific requirement encourages the merging firms to be efficient using means other than merger.
This could be licensing agreements, co-operative joint ventures or a differently structured merger.[30]

3.3 verifiable

"Efficiencies are easy to claim, but hard to prove."[31]

Economic theory is still in doubt on how efficiency

[28] Guidelines point 85
[29] Case IV/M053, Aerospatiale-Alenia/de Havilland point 69
[30] Faull & Nikpay (2007) p 510
[31] Fisher (1983) p 1691

gains can be verified. The burden of proof is on the merging parties, and the Commission has most belief in efficiencies that can be quantified. If it's not quantifiable, the Commission still might still clear the merger, but then the efficiencies must "foresee a clearly identifiable positive impact on consumers, not a marginal one".[32] This is a very strict standard, so an unquantifiable efficiency gain has little chance to be cleared. That the burden of proof lies on the merging parties is natural, since they possess the information needed for making this assessment. If the Commission had the burden of proof, it is likely that the merging parties would attempt to submit the information selectively by concealing the data that does not support their case. As a counterpart to this the Guidelines seem to strike a fair balance, since, while placing the burden of proof with the notifying parties, they do not impose a strict standard of proof on the merging parties. The Commission doesn't require the efficiencies to be undoubtedly quantified. The Commission only have to be "reasonably certain"[33] that the efficiencies will counteract the potential harm in the merger.

4 Typology of efficiencies

[32] Guidelines point 86
[33] Guidelines point 86

There are a few ways to sort efficiencies, but I'll keep it simple and go through the different types first, and then look on how to assess them after.

4.1 Rationalization

This is when the merged group manage to reallocate across plants and reduce its total costs, without changing the firms' *joint* production. This might be done by shifting production to the plant with lowest marginal costs, or the plant with excess capacity. The goal is to reallocate so the marginal costs are equal across the plants.[34]Then it's not possible to rationalize it to a more efficient level. If one of the plants very modern and efficient, while the other is old and inefficient, this might lead to the closure of the inefficient one, and moving all the production to the efficient one.
The reason why this is possible might be that the firm was in a market with high fluctuating demand. Before the merger both firms had to use inefficient plants at times with high demand, but now they can increase output from the most efficient plants. Especially if their demand peaks didn't use to correlate totally. Then a merger will enable the new company to smooth out the demand fluctuation.[35]

[34] Røller, Stenek & Verboven (2001) p 5-6
[35] Spector (2007) p 21

4.2 Economies of scale

No matter how small your business is; there are some minimum expenses to keep the business operational. This is costs like administrative, purchasing and personnel costs.
These costs are duplicated in the two firms, and if they merge they can do the job only once. This is reduction in fixed costs, and here it's important to have the guidelines in mind. Because they claim that these efficiencies are less likely to result in lower prices for consumers.[36]This does not mean that these efficiencies are disregarded *per se*, but if the merging parties think this will have a positive result post merger, they have to be very precise on this point, and explain how so. Arguments for this can be that a shift in fixed costs may make a product that before was unprofitable now may be profitable. This will not decrease the price of the product, but keep it on the market at the same price as before instead of the product been taken off the market.[37]Also, if the merged group keep most of the profit from cuts in fixed costs, it doesn't mean that consumers can't profit from it. This will give the post-merger group room for investments in research and

[36] Guidelines point 80
[37] Spector (2007) p 22

development, which also benefit consumers. Here it’s also important to have good arguments in a potential merger case, since the commission is in general sceptic to the argument.[38]

But there are many economies of scale arguments the Commission are in favour of, for instance the economic concept of product-specific economics. This means that it cost less to produce product number two, than product number one. For instance, if you produce a newspaper, you can spread out the fixed costs on more copies. This is true until it cost more to produce one more product than the buyer is willing to give for the product.[39]

Another aspect of economies of scale is that when a company increase it’s production, it’s incentive to invest in new and better technology also increase. This might be anything from expensive software, to faster machines or more energy efficient machines.

Next, the post-merger group also might benefit from specialization of their workers. This is because each worker can concentrate on his task, rather than doing a little of everything. It’s also possible to specialize the plants. If they used to produce different products in the same plant, it might now be possible to specialize the plant to one type of products. This means that the plant is using less time to shift the production within the plant.

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[38] Spector (2007) p 23
[39] Lindsay (2006) p 491

The exploitation of economies of scale might also have some negative effects on the benefits to the consumers, and this loss is important to remember when measuring the net benefits of scale. This may involve a reduction in product diversity that in its nature is negative.
If companies become too large and efficient, the Commission sees this as a problem as well. This is because it can create barriers to entry for new companies, or force other companies out of business. The last argument is debated, because it can be seen as a way of protecting competitors, and not competition. This was part of the challenging of the GE/Honneywell (FN) merger by the Commission.

4.3 Technological progress

Technological progress from mergers can either result in new products (innovation), cheaper products or higher quality products.
If one of the merging companies has a very cost-efficient production level, while the other has a patent this plant can produce, the diffusion of this know-how's will result in a lower per unit cost. This could also lead to a product with higher quality. The take over of many Eastern European companies after the fall of the iron curtain is a god example here. The Eastern European companies had old production methods,

and less efficient management. This made them vulnerable for takeovers form Western Europe, and many Eastern European companies were taken over because of this. [40]

One of the merging companies may have a good R&D- department, but not have the economic strength to operate at the highest level. If the other merging company have the economic strength, it is more likely to succeed in innovating a new product.[41] This has happened many times in the medical sphere, because it's so expensive to invent a new drug, and it take a long time from the beginning of a project until the drug is produced, tested and ready for the market. Another reason a merger like this is efficient, is that internal funding is cheaper than external funding.[42] The external capital market doesn't like the risk, so they ask for a high interest rate, while if the company is bought the larger company sees it as an investment. A large company also have a better chance at securing a loan from a bank, and will get a better interest rate at the same loan as a small firm will get.[43]

Last, the companies may learn from each other's experience, and become more efficient because of this. This is known as the "spill over effect", or synergies. These are not easy to quantify, and they do take a little time to materialize.

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[40] Spector (2007) p 22
[41] Röller, Stennek, Verboven (2001) p 10
[42] Spector (2007) p 23
[43] Röller, Stennek & Verboven (2001) p 13

This means that the Commission is less likely to assign synergies because they are not timely.[44]

4.4 Buyer power

A post-merger company will also have a larger chance of exercising buyer power. When the merged company purchase materials from their upstream supplier, they now buy a larger quantity, and this can be used to negotiate a better price than the two companies could negotiate separately. As long as this doesn't restrict downstream competition or lower total output, the commission accept that a proportion of this is likely to be passed on to consumers.[45]

4.5 Xinefficiency

Mergers don't only produce efficiencies, but sometimes also internal inefficiencies. This is often referred to as xinefficiencies, or slack. When a firm groves, it is also harder for the management to keep the firm as efficient as it possibly can. And gathering all the information needed for assessing this s costly.
But this would make the firm undervalued and lowers the firm's stock price. This may induce another company to buy the firm, re-organize and bring the firm back to profit maximizing behaviour. This threat of a take-over can be

[44] Guidelines point 83
[45] Guidelines point 61&62

sufficient to discipline the current management into working as efficient as possible.[46]

5 Assessment of efficiencies in mergers

Now it's time to see how the efficiencies can be assessed in mergers, and what could be done to assess them in a better way. First I analyze the Norwegian Gilde/Prior-case in 5.2 to 5.7. This case is interesting because it might be the first European case to clear a merger on the grounds of efficiency claims. Then I look at other possibilities that can be used to assess efficiency claims in mergers in chapter six.

5.1 Gilde/Prior-case

Norway is not part of the European Union, but it is a part of the European Economic Community. And through this the Merger Regulation is a part of Norwegian law in the same way as it is for countries that are in the EU.

5.2 The merging companies

[46] Röller, Stennek & Verboven (2001) pp 13-14

Gilde is a co-operative owned by 28.000 farmers in Norway and it operated in the pork and beef market. It was the market regulator, and had a market share between 43-74 percent in 2004.
Prior is also a co-operative owned by 1.200 farmers. It operated in the market for resale of eggs, processing and sale of poultry products and egg products. It had a market share exceeding 60 percent.

5.3 Relevant markets

First, the Competition Authorities assessed if the two were competing in the same market, and found that these were probably two different markets. This was based on analyses by the Commission in similar cases. But the Norwegian Competition authority didn’t find it necessary for the output of the case to decide this, because they thought it would be the same result, regardless if it was a horizontal merger, or a conglomerate merger.
The Norwegian Competition then saw Gilde as the only potential competitor that would be able to enter the Norwegian market for poultry. Further, they saw this potential loss of a competitor as a substantial welfare loss.

5.4 Efficiency gains

The merging parties had done an incomplete economic analysis of the efficiency claims, but the Competition Authority found it reasonably verified that the efficiency would amount to NOK 10-15 millions (€ 1.3 – 2 millions).

5.5 Assessment by the Norwegian Competition Authority

The efficiency gains were not big enough to counteract the harm in the Norwegian Poultry market, and on these grounds the merger was prohibited.

This prohibition was as expected. The two merging parties where the two biggest actors in their respective markets, and if they merged it would make the barriers to enter higher in both markets, and the incentive to invest in research and development would also decrease because of the loss of potential competition.

5.6 Appeal to the Norwegian Ministry of Government, Administration and Reform

But Gilde/Prior appealed the prohibition to the Norwegian Ministry of Government, Administration and Reform; which is the court of appeal for mergers in Norway. And on the 5th of October 2006 the ministry cleared the merger. In between the merging parties had done a more extensive economic analysis, but other than that the

premises were the same.
The Ministry found the two companies to be in two different markets, and that Gilde was not likely to enter in to the poultry market. They also found that the efficiency gains from the merger would counteract the potential harms in the relevant markets.
A very interesting point in the assessment of the efficiency gains here is that the ministry disregarded any negative effects that would materialise outside Norway. This way the increased barging power the post merger company would have could be used to obtain lower purchase prices from foreign suppliers. Some commentators[47] argue that this has a protectionist flavour, because this is a way to strengthen Norwegian agriculture policies against larger, and more efficient, foreign agriculture. Other see this as a big victory for efficiency gains in mergers.
It will be interesting to see how the Norwegian Competition Authority will follow up this path pointed out by the ministry in later decisions.

6 Other possible ways to assess efficiency gains

6.1 Quantifying the harm of competition

Since efficiencies have to be verifiable, it is arguable that the harm of competition has to be

[47] For instance Vesterkjær (2007) p 37

verified as well. In this way, there would be two numbers to compare, and the assessment would be very easy. The side with the biggest number would win. The Commission argues that this would be too time consuming, and that it is impossible to do this accurately. But at least this way it would be more understandable for the merging parties to understand why the merger was prohibited. It feels very unfair when you have quantified a efficiency gain like Gilde/prior had, and just get it prohibited with the reasoning that we don't know the harm to competition, but it will probably be higher. Then a prohibition on the basis of quantified harm would be much more easy to accept.[48]

6.2 Qualitative studies of efficiencies

The other extreme of the burden of proof would be to allow qualitative assessments of the efficiencies as well. Efficiencies that can be verified should of course still be verified. This is normally the static efficiencies, wich means that it is conducted for a given point in time. Static efficiencies covers allocative efficiencies (equalization of market prices) and productive efficiencies (production of output at the least cost).

But with the quantitative condition it is very hard to get the Commission to accept dynamic efficiencies. Dynamic efficiencies is an

[48] Arguments from the Gillde/prior-merger

analysis who covers several periods, and it focuses on the improvement of products and production over time.[49]

6.3 Partial defense

Some efficiencies are more likely to materialize than others, and the Guidelines recognizes this where it says that "cost efficiencies that lead to a reductions in variable or marginal costs are more likely to the assessment of efficiencies…"[50] This is a partial dense, putting some efficiencies at an advantage over other efficiencies.[51] Here it would be helpful if there could come some clarification on how much more emphasis the Commission will put on these efficiencies, and how much verification which is needed.
The drawback with this is that merging parties would be trying to label their efficiencies in a way that would be most favourable to them.

6.4 Clarity

For companies that are considering a merger, the most important thing is to have clear rules to relate to. This way they can assess quickly if

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[49] Schmidt, (2007) pp 533-534
[50] Guidelines point 80
[51] Röller, Stennek & Verboven (2001) p 74

they would have a chance in getting the merger cleared. This would first save a lot of time, which is important, but also save money. In the Gilde/Prior-case the cost of lawyers and an economic analyst firm added up to € 500.000, and that was in reality a simple merger. And expertise is cheap in Norway compared to other countries. So the costs can easily be many times as much. This favours the largest companies who can afford to risk going through such a process without betting the merger cleared. This can also prevent potential beneficial mergers to go through, because the barrier is to high.
A last point in this category is that it’s also important for the players in the market to know that they compete with the same rules. This way they can focus on the most important thing; competing.

Conclusion

Before making any recommendations for change, it’s important to emphasize that very few mergers are prohibited. So it would be an overstatement to say that there is a big demand

for a change.
And the Guidelines have a very balanced view most of the time. When it gives the merging parties the burden of proof, they give them the benefit of not having to be undoubtedly quantified. The biggest problem is actually that because of this middle way, it’s very hard to be sure how to assess efficiency gains. This was probably made like this so the Commission could have some discretion to define this through decisions. This would give them the chance to adjust it as they see how previous decisions have worked. It might seem like the Commission is waiting for the perfect case to arrive, but it is time to see a detailed assessment of efficiencies in mergers soon.
Also, since the Commission has acknowledged that efficiencies needs to be a part of the assessment of mergers, and therefore it also should clarify to what degree this will be done. For companies that are considering a merger it’s very important to know what analyzes they need to do to see if the merger will be cleared. If not, a lot of time and money can be wasted because of the unclear ground of efficiency gains. The Gilde/Prior case might have been a nice first step, but other steps also have to be made. And since this only was a national case it’s important that the Commission make the next.

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